Supreme Court, U.S.
FILED
MAY 9 2002
OFFICE OF THE CLERK

No. 01-1488

In The Supreme Court of the United States

OREGON ARENA CORPORATION
AND MICHAEL FENNELL,

Petitioners,

v.

DANIEL LEE, MICHAEL CARR, EDWARD
GATHRIGHT AND JEREMY SONNIER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners have misstated the question presented on this petition by attempting to characterize this case as a private party's regulation of speech on "its" [i.e., private] premises" (Petition, p. i) when it is undisputed this case involves an express delegation of speech regulation by the City of Portland in an admitted public forum situated on publicly-owned property.

Rather, the question presented on this petition is more accurately whether the Ninth Circuit properly decided petitioners were state actors when the undisputed facts show petitioners were promulgating and enforcing policies in a traditional public forum located on real property owned by the City of Portland under express delegated authority of the City to protect free expression in that forum.

LIST OF PARTIES

Respondents accept and agree with petitioners' statement of the parties.

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OPINIONS BELOW

Petitioners correctly recite the opinion of the Court of Appeals is reported at 276 F.3d 550 (9th Cir. 2002), and the decision of the district court is unreported.

JURISDICTION

Respondents accept petitioners' statement of jurisdiction based on 28 USC §1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

This matter arises under 42 USC § 1983 alleging violation of respondents' speech and religion rights in the Rose Quarter Commons, a traditional public forum situated on city-owned property, under the First and Fourteenth Amendments.

STATEMENT OF THE CASE

Except as otherwise noted herein, respondents accept petitioners' statement of the case, but draw the Court's attention to petitioners' misstatement of key material facts. Petitioners go to great lengths to differentiate what is publicly and privately owned around the subject forum, the Rose Quarter Commons (Petition, p. 2), but remain silent on what was undisputed below: the Ninth Circuit's finding, based on stipulated facts, "Portland owns the real property on which the Commons is located" (App. 3a). Petitioners also misquote the district court's findings of

undisputed fact. *Compare* "The City owns *portions of* the real property referred to as the Rose Quarter Commons" (Petition, p. 2) with "The City owns the real property referred to as the Rose Quarter Commons." (App. 18a) (emphasis added).

In the same manner, petitioners misstate the record in an apparent attempt to minimize the Court's appreciation of their continuous regulation of speech and conduct on the Commons, even when events are not in progress at nearby venues. They would have the Court believe petitioner's rules and code of conduct concerning speech apply only when "*the Rose Garden* – the sports arena – is open to the public (Petition, p. 3) when in fact "The Rules provide that free speech activity 'may occur only during the hours *the Rose Quarter Commons* is open to the public . . . '" App. 18a-19a (emphasis added).

Finally, petitioners subtly invite the Court to overlook a significant admission made on appeal: "The OAC has never challenged the plaintiffs' characterization of the Commons as a traditional public forum." *See* App. 3a. However, petitioners correctly acknowledge what was undisputed below: the City's original lease with petitioners required them "to permit access to and free speech on the Plaza as may be required by laws." App. 3a, 18a.

REASONS FOR DENYING PETITION

Petitioners invite this Court to accept review on the misleading premise this case:

> "potentially turns *any* private entity who regulates speech activities on *its* property into a governmental actor subject [sic] liability for civil

> rights violations. *Private* entities have long been able to regulate conduct on *private* property without being subject to claims of First Amendment violations. [Citations omitted]." Petition, pp. 4-5 (emphasis added).

Such a claim is overreaching, and the authorities on which it is based are totally irrelevant to the central question herein of petitioners' operation of a traditional public forum under an express governmental delegation of rulemaking and enforcement authority.

1. The decision of the Ninth Circuit was correct.

The Ninth Circuit correctly applied well-established authorities from this Court to undisputed facts in determining petitioners were state actors subject to liability under 42 USC § 1983 under this court's "public function" test. Petitioners claim "the regulation of speech activities has never been held an exclusive public function, and private action taken on public property has also never been held to be an exclusive public function as required by that test." Petition, p. 6. Petitioners are wrong on both counts.

Rather, the Ninth Circuit properly relied upon this Court's decision in *Marsh v. Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946) in determining the regulation of religious speech within a public forum to be a traditional and exclusive public function:

> In *Marsh v. Alabama* [citation omitted], the Court examined whether a company that regulated speech in a shopping district in its privately owned town became a state actor. The Court concluded that it did. The Court explained

> that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 503. Given that circumstance, the fact that the property is private is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties.' *Id.* at 509 . . . " [W]here facilities are built and operated primarily to benefit the public . . . their operation is essentially a public function . . . subject to state regulation." *Id.* at 506; see also *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanueil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D.Mass. 1990). App 8a.

If anything, the presence of public ownership of the underlying property herein strengthens the reasoning of this Court in *Marsh* and confirms its persuasiveness herein. Petitioners' effort to distinguish *Marsh* on its facts and its holding is unpersuasive because it is again misleading:

> This case presents a different fact scenario – the Rose Quarter Commons consists of privately owned *buildings* which are sometimes open to the general public and *some* City-owned property, all controlled by a private, for-profit company. Petition, p. 8 (emphasis added).

Similarly, the Ninth Circuit's reliance on *Evans v. Newton*, 382 U.S. 296, 15 L.Ed.2d 373, 86 S.Ct. 486 (1966) aptly demonstrates the fallacy of Petitioners' claim "private action taken on public property has also never been held to be an exclusive public function." Petition, p. 6. As this Court held in *Evans v. Newton:*

> The public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. *Id.* at 302.

The critical factor in *Marsh* and *Evans* is delegation of public authority to a private party to regulate a public forum, already determined by this Court to be an exercise of exclusive public function. The record herein further demonstrates the City of Portland required petitioners to engage in promulgating rules protecting speech for the forum (App. 3a, 18a), the exclusive province of the government. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). Moreover, delegated authority to exercise discretion in the enforcement of criminal statutes and private policies enacted at the behest of the city is properly an exclusive public function. *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanueil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D.Mass. 1990).

This case adds nothing to the jurisprudence in this area because it calls for a direct application of this Court's decisions in *Marsh* and *Evans*, correctly applied in *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanueil Hall Marketplace, Inc.*, *supra*, 745 F. Supp. 65. *See also Venetian Casino Resort LLC v. Local Joint Executive Board of Las Vegas, et al.*, 257 F.3d 937 (9th Cir. 2001) (formerly public sidewalk relocated onto private casino property under an agreement to maintain public access remained a public forum subject to the protections of the First Amendment, relying on *Fanueil Hall Marketplace).*

2. There is no split of authority between the circuits concerning application of the "public function" test for determining state action.

Petitioners attempt to create an illusory split of authority where none exists concerning application of the "public function" test for state action between the Ninth Circuit's decision in this case and decisions from the Seventh and Tenth Circuits, claiming this Court "has never considered [whether] the private exercise of traditional police functions [is a public function]." Petition, pp. 5, 9. In fact, those decisions are easily reconcilable based on what is "necessarily a fact-bound inquiry," *Brentwood Academy v. Tennessee Secondary Athletics Assn.*, 531 U.S. 288, 295, 148 L.Ed.2d 807, 121 S.Ct. 924 (2001), because most of those cases involve limited policing authority without reference to rulemaking in a traditional public forum.

Wade v. Byles, 83 F.3d 902 (7th Cir. 1996), involved a limited and nonexclusive grant of police authority to private security forces in the main lobby of a public housing project. *Id.* at 905-906. It is not instructive and does not conflict with the instant decision of the Ninth Circuit for the reason expressly articulated by the Ninth Circuit herein:

> The present case, unlike Wade, does not turn on whether the use of *limited* police powers on public land is a public function. It turns on what is quintessentially an exclusive and traditional public function – the regulation of free speech within a public forum. App. 11a (emphasis added).

Neither *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995) nor *Rendell-Baker v. Kohn*, 457

U.S. 830, 73 L.Ed.2d 418, 102 S.Ct. 2764 (1982) dictate a contrary result. *Gallagher* arose from pat-downs conducted by private security forces outside a concert arena on the campus at the University of Utah with no involvement of public officials or entities beyond receiving incidental proceeds of concert revenue and ownership of the concert venue. *Gallagher v. Neil Young Freedom Concert*, *supra*, 49 F.3d at 1455. The *Gallagher* court expressly distinguished the case factually from *Fanueil Hall Marketplace*. *Id.* at 1457. *Rendell-Baker* is inapposite because it involved a personnel decision at an institution receiving federal funds, with no indication any of those federal funds or any government mandate were directly related to the employment of the affected personnel. *Rendell-Baker v. Kohn*, *supra*, 457 U.S. at 840-842.

CONCLUSION

The petition should be denied because it misstates and misapplies the law and the undisputed facts in an effort to create an illusory circuit split when in fact this case fits squarely within existing, well-established constitutional jurisprudence of this Court. The presence of express government delegation of rulemaking for the protection of speech in what is admittedly a traditional public forum, together with the exercise of enforcement authority of those public and private rules, properly and fairly attributes the stamp of governmental authority and state action to petitioners' treatment of respondents.

DATED this 9 day of May, 2002.

Respectfully submitted,

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